

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 5036 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

LAVJIBHAI MANDANBHAI PATEL

Appearance:

MR MANISH R BHATT for Petitioner
MR HARIN P RAVAL for Respondent No. 1
MR BP TANNA for Respondent No. 2
MR KC SHAH AGP for Respondent No. 5
None for respondents No.3 & 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: 06/04/2000

ORAL JUDGEMENT

[Per : D.C.Srivastava, J.]

#. The Commissioner of Income Tax, Rajkot - defendant No.3 has filed this appeal against the judgment and decree dated 14-10-1996 of Second Joint Civil Judge (SD), Rajkot in Special Civil Suit No. 35 of 1992 filed by Lavjibhai Mandanbhai Patel. The facts in detail have been narrated in First Appeal No.93 of 1997.

#. The brief facts essential for disposal of this appeal are that the plaintiff claimed to be the owner of the land of survey No. 479 measuring 4 acres and 7 gunthas. There was some confusion in the mind of the defendant No.1 who is respondent No.2 in this appeal. The Rajkot Municipal Corporation claimed to be in possession of the entire land. According to the Corporation, the land vested in the State Government and was recorded in the name of the State Government and the Municipal Corporation was managing the land for and on behalf of the State Government. A portion of the land of survey No.479, area 4 acre and 7 gunthas was sold by defendant No.1 to the present appellant - defendant No.3 and the defendant No.3 purchased 7,655.50 sq.mtrs land from defendant No.1 shown by black colour in the map, as bonafide purchase for value without notice of any defect in title or dispute regarding the title of the land between the plaintiff and the defendant No.1. Being bonafide purchase for value without notice to any defect in the title of the seller the defendant No.1, the defendant No.3 raised multistoried constructions. The plaintiff sought demolition of the construction raised by the appellant defendant No.3.

#. The defendant No.3 resisted the suit mainly on two grounds. The first was that the suit is barred by Section 80 of Code of Civil Procedure (for short 'CPC') inasmuch as, compliance of Section 80 of CPC was not done by the plaintiff. The second was that the appellant being bonafide purchase for value without notice of the defect in title was entitled to raise constructions and such constructions in law and equity can not be demolished.

#. The learned Judge of the Court below found that there was effective compliance of Section 80 of the Code of Civil Procedure and that instead of granting the decree for possession by demolishing the building raised by the appellant over a portion of the plaintiff's land, it

thought just and equitable to grant compensation to the plaintiff for a sum of Rs.25,08,000/- with interest at the rate of 12% from the date of the suit till realisation.

#. Shri Pranav G. Desai, learned counsel for the appellant and Shri H.P.Rawal, learned counsel for respondent No.1 and Shri B.P.Tanna, Senior Advocate for respondent No.2 and Shri K.C.Shah, learned AGP for respondent No.5 were heard. None appeared for respondent Nos.3 & 4.

#. Shri Pranav G. Desai, learned counsel for the appellant has raised only three contentions to assail the judgment and decree of the trial court against the appellant.

#. The first contention has been that there was no compliance of proviso to Section 80(2) of the Code of Civil Procedure inasmuch as, no notice was given to the appellant before permitting the plaintiff to institute the suit without serving notice under Section 80, CPC upon the appellant. Shri Pranav G. Desai has addressed us on the findings on Issue Nos.4, 18 and 19 only as recorded by the trial court. In addition to this, he also addressed us on further point that the trial court was not justified in giving right of passage to the plaintiff over the land in question in possession of the appellant.

#. So far as the finding on Issue No.4 is concerned, it is borne out from the record and also from the findings recorded by the trial court while dealing with the Issues Nos.2, 3, 4, 5 and 14 that some portion of Survey No.479 belonging to the plaintiff was sold by the defendant No.1 to the defendant No.3. As such, on this point, not much detailed findings are needed from us. Even this finding was practically in favour of the appellant.

#. The second point urged by Shri Pranav G. Desai was on Issue No.19 where the trial court, while discussing the effect of non service of statutory notice on defendant No.3, observed that it has no effect. This take us to consideration of the provisions of Section 80 of CPC.

##. While dealing with Issue No.19, the trial court found that non service of notice itself is not a ground on which institution of suit is debarred. It has

referred to the provisions of Section 80(2) of Code of Civil Procedure. The trial court has further referred to earlier passed in Exh.7 where permission to institute the suit without serving notice under Section 80, CPC was passed. On these two grounds, the trial court held that there is no effect of non service of statutory notice. Shri Pranav G. Desai however, had drawn our attention to the findings of the trial court on Issue No.19 and contended that the trial court has reproduced only portion of Section 80 (2), CPC and has omitted to reproduce the proviso to Section 80(2) which has material bearing on the finding on this issue. It is clear from Exh.7 that before instituting the suit, the plaintiff applied for permission to institute the suit without serving notice under Section 80, CPC and that permission was granted. No urgent or interim relief was granted at that stage. Thereafter, a show cause notice was issued and the appellant defendant No.3 had full knowledge of institution of suit without serving notice under Section 80, CPC.

##. Section 80(1)(a) of CPC provides a mandate that no suit inter alia against the Central Government can be filed without serving notice under Section 80 (1) of the CPC and after waiting for the expiry of two months next after notice in writing has been delivered to the Secretary to the Central Government. An exception is provided in sub Section 2 of Section 80, CPC which reads as under :-

" A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit."

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirement of sub section (1). "

##. Shri Pranav G. Desai relying upon this proviso vehemently argued that before granting permission to institute the suit without service of notice under Section 80(1) of Civil Procedure Code, the Court below was obliged to hear both the parties and then only, the suit could be permitted to be instituted without serving notice under Section 80 CPC. He further argued that since this proviso has not been reproduced by the trial court while deciding Issue No.19, it committed manifest error of law in interpreting the effect and scope of Section 80(2) of the Code of Civil Procedure in its proper perspective. We have heard Mr.Desai in detail on this point but we are unable to accept his contention.

##. The scheme of Section 80(2) read with proviso to this sub section, to our mind, is as follows :

- (I) Normally suit against the State Government or Central Government cannot be instituted without serving a notice under Section 80(1) of CPC and after waiting for two months of service of notice.
- (II) An exception is contained in Section 80(2) which is to the effect that where the suit is filed for obtaining an urgent or immediate relief, the plaintiff may approach the court where the suit is to be instituted with prayer that the he may be granted leave to institute the suit without serving any notice as required by sub section 1 of Section 80.
- (III) If the leave is granted by the Court to institute the suit without serving notice under Section 80(1) of the CPC, it shall not grant relief in the suit whether interim or otherwise except after giving an opportunity to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of relief prayed for in the suit.
- (IV) If however, after hearing the parties, the Court finds that no urgent or immediate relief need be granted in the suit, it may return the plaint for presentation to it after complying with the requirements of sub section 1 of Section 80.

##. It is thus clear that the first part of sub section 2 of Section 80 does not oblige the court to afford an opportunity of hearing to the defendant whether leave to

institute the suit without serving notice under Section 80(1) of CPC should be granted or not. This exercise can be done in the absence of the State Government or the Central Government or the Public Officer as the case may be. The intention of the legislature has never been that while granting leave, the Court should hear the State Government or Central Government or the Public Officer. Of course, the Court is required to apply its mind while granting leave to institute a suit without serving notice under Section 80(1) of the Code of Civil Procedure whether the matter is urgent and whether the suit can be permitted to be instituted without service of notice. This is not end of the matter. The proviso to sub section 2 has to be read thereafter. Thus, in our opinion, no opportunity of hearing is required to be given to the State Government, Central Government or Public Officer to oppose the leave prayed for by the plaintiff for institution of suit involving urgent and immediate relief. Of course, if after the leave of the Court is granted and the suit is instituted without service of notice under Section 80(1) and the plaintiff applies for interim or other relief, no such interim or other relief shall be granted by the Court except after giving reasonable opportunity of showing cause to the State Government, Central Government or the public officer in respect of the relief prayed for in the suit. So only in the case of urgency, when urgent ex parte relief is sought in the plaint, the Court will refuse to grant such relief unless the State Government, Central Government or Public Officer is given reasonable opportunity of showing cause in respect of the proposed interim relief.

##. Proviso to sub section 2 will be attracted thereafter in the third instance. Normally, leave to institute a suit is granted by the Court and a show cause notice is issued by the Court to the State Government, Central Government or Public Officer against grant of interim relief. Such Government and public officer shall be heard and if after hearing the parties, viz. the plaintiff and the State Government, Central Government or Public Officer, the Court is satisfied that no urgent immediate relief need be granted in the suit, it shall return the plaint for presentation to it after complying with the requirements of sub section 1 of Section 80. Consequently, in our view, the proviso is attracted in the third stage when the defendant viz. the State or the Central Government appears or Public Officer appears and opposes grant of interim relief. If the Court on such objection from the defendant and hearing the parties is

satisfied that no urgent or immediate relief need be granted, in that case, it shall return the plaint for presentation to it after serving notice as required under sub section 1 of Section 80.

##. In our opinion, therefore there was no non compliance of the proviso to Section 80(2) of CPC and as such, it cannot be said that the suit is barred or is bad for non service of statutory notice on the defendant No.3

##. On Issue No.18, the learned counsel for the appellant Shri Pranav G. Desai rightly contended that since the land was purchased by the defendant No.3 in bonafide manner for valuable consideration without having notice of any defect in the title of the defendant No.1 or without notice of the dispute of title between the defendant No.1 and plaintiff, it was justified in raising constructions and as such, the constructions raised by the defendant No.3 cannot be demolished. The trial court has also taken the same view. It observed that since a portion of the land belonging to the plaintiff was sold by mistake by the defendant No.1 to the defendant No.3, order for demolition of constructions raised thereon by the defendant No.3 need not be passed rather award of compensation will be adequate relief. The trial court rightly refused to set aside the sale in favour of the defendant No. 3 and rightly directed the defendant No.1 to pay a sum of Rs.25,08,000/- as compensation to the plaintiff with interest at the rate of 12 % per annum from the date of the suit till realisation. This part of the decree of the trial court is just and equitable, hence it requires no interference.

##. Shri Pranav G. Desai, in the last contended that the relief "B" granted by the court below was also unjustified and it could not be granted. This relates to right of passage given to the plaintiff against the appellant. The defendant No.3 purchased 627 sq.mtrs land of survey No.479 through sale deed Exh.209 from the defendant No.1 in good faith for value without notice of defect in vendor's title and carried out construction. The trial court found that the defendant No.3 had put up a gate on the northern side of its land which abuts the land of the plaintiff. The area of the said land of the plaintiff, according to the trial court, was 579 sq.mtrs and shown by yellow line in Exh.209. Ring Road is situated on the eastern side of the land of the plaintiff and the defendant No.3, according to the trial court, can have access normally for coming and going from that direction also. The trial court further found that the defendant No.3 had constructed a gate on the northern

side by incurring cost. The trial court therefore, refused to grant relief to the plaintiff for closing the door. It was not just and proper, according to the trial court, to grant such relief to the plaintiff. However, the trial court found that at the same time further order is also required to be passed that the gate passage should only be utilised for coming and going and nobody should prevent the plaintiff from enjoying the above land measuring 579 sq.mtrs. Consequently, it is not the case where right of passage was granted by the trial court to the plaintiff in respect of the land or portion of land purchased by the defendant No.3 from the defendant No.1

##. In para B of the operative portion of the order, the trial court directed that 579 sq.mtrs land belonging to the plaintiff be restored in possession of the plaintiff. The defendant had put up the gate towards the land of the plaintiff. The trial court therefore refused to grant relief for closure of the gate but it made clear that for the rest of the land admeasuring 579 sq.mtrs., the plaintiff should be permitted to use his aforesaid land without any obstruction from anybody. In this background, the trial court ordered that except as indicated above, the defendant No.3 or anybody should not obstruct the plaintiff in his possession and enjoyment of the land survey No.479. Thus, the discussions contained in the trial court's judgment on this point in the body of the judgment at internal page 49 cannot be said to be confusing nor para B of the operative portion of the order can be said to be confusing. Whatever relief was granted, it was in respect of the land belonging to the plaintiff. Simply because the trial court refused to grant relief of closure of the gate opened towards plaintiff's land, no interference in this finding is, required.

##. No other point was pressed before us. We don't find any merit in this appeal which is hereby dismissed. No order as to costs.

[D.C.Srivastava, J.]

Date : 6-4-2000 [H. K. Rathod, J.]

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